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## A comment on changes in the Norwegian Land Consolidation Act

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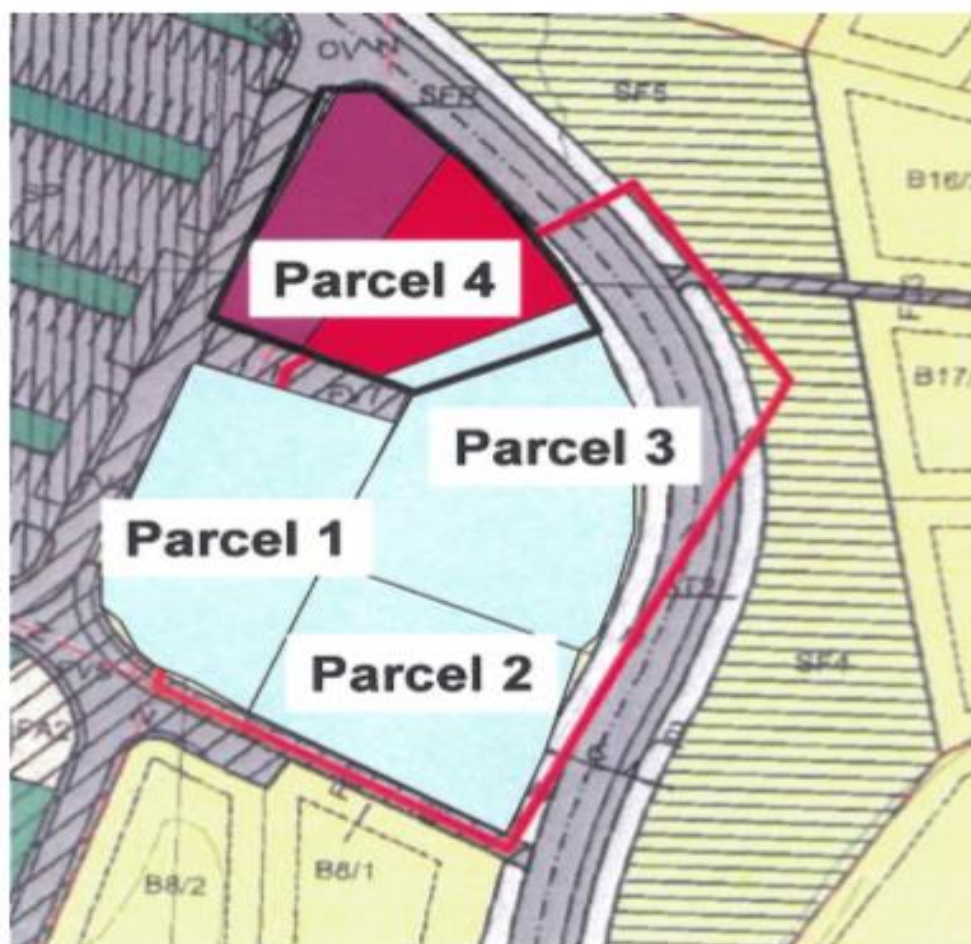
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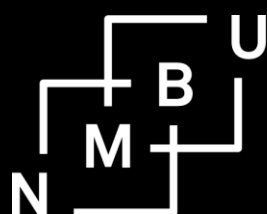
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# A comment on changes in the Norwegian Land Consolidation Act

Per Kåre Sky

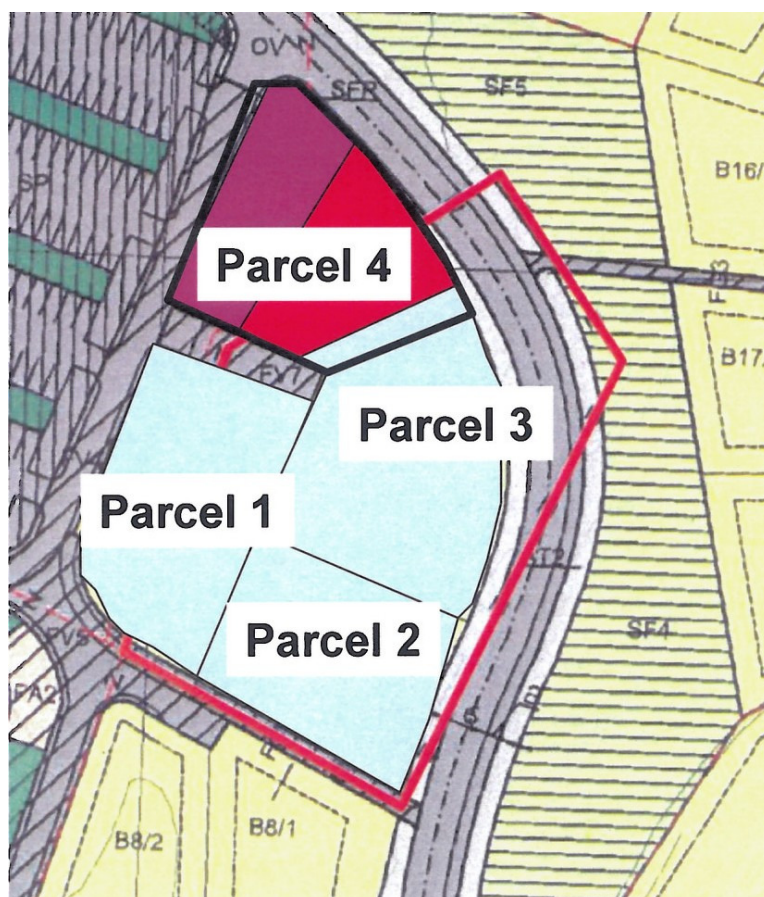


Land consolidation in urban areas – after situation



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## A comment on changes in the Norwegian Land Consolidation Act

Per Kåre Sky

## **A comment on changes in the Norwegian Land Consolidation Act**

*Per Kåre Sky<sup>1</sup>*

**Abstract:** The Land Consolidation Act has recently been revised. The changes came into force on 1 July 2006 and 1 January 2007. The main changes in the Act are that the land consolidation court now has formal jurisdiction to handle land consolidation cases for all types of properties independent of location, unless particular cases are specifically removed from the court's jurisdiction in the Act. The Act provides for two new types of land consolidation cases in Section 2. The paper analyzes these different revisions.

### **1 Introduction and background for the changes in the Act**

On 18 January 2002, the Norwegian Ministry of Agriculture established a working group (the Movik commission) to draw up, amongst other things, proposals for legislative changes relating to the allocation of land values, costs and funds for mitigating measures when implementing projects pursuant to the Planning and Building Act (Ministry of Agriculture 2003). In this paper I will comment on these legislative changes. I will discuss in detail the geographical area of application of the Norwegian Land Consolidation Act, the new legislative measures and the absolute procedural assumption that applies to Subsections 2(h) and 2(i) of the Land Consolidation Act. I will also look at the requirements for requesting a hearing under Subsections 2(h) and 2(i), and discuss valuation and planning issues.<sup>2</sup>

One of the important references for the work of the Movik commission was the Commission for New Planning Legislation's report NOU 2001:7 "Better municipal and regional planning under the Planning and Building Act (PBA)". The Commission said that it was necessary to look more closely at the potential expansion of the use of land consolidation measures. In order to improve the implementation of projects, the Commission proposed that a framework should be put in place to make it easier to make changes in urban areas that are already developed, based on the same principles as the framework for land consolidation.<sup>3</sup> On page 95 of its report, the Commission also said: *"[c]omplicated, unclear and inappropriate property ownership is a common reason for developments and other measures being hard to implement, particularly in built-up areas. Property boundaries and rights often need changing for it to be practicable for a development to go ahead. It is sometimes also necessary find a sensible way of allocating rights and values between property owners, in order to produce a project that is advantageous and reasonable from the point of view of all of the property owners. The measures set out in the PBA for dealing with this kind of problem – primarily expropriation and compensation – are sometimes conflicting or impracticable as a result of the available solutions and approaches not being sufficiently flexible."*

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<sup>2</sup> Unless otherwise stated, references in this document refer to the Land Consolidation Act. You can find a translation of the Land Consolidation Act at: <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf>

The translation is unofficial and not fully updated.

<sup>3</sup> NOU 2001:7, p. 20

In addition to the need for new measures, the legal precedent set by the Interlocutory Appeals Committee of the Supreme Court had clarified the geographical area of application of the Land Consolidation Act. In Rt. 2000 p. 1119 (the Skrautvål verdict) the following statement was made: *“It follows from Subsection 3(b) of the Land Consolidation Act that land consolidation cannot be effected for properties situated in built-up areas, until the local authority has had an opportunity to express its opinion. But apart from this limitation, the Land Consolidation Act applies to all properties, regardless of their location, ...”*. The Ministry therefore wanted to enshrine this current practice in law.<sup>4</sup> There were also a significant number of legal precedents from courts of first instance relating to land consolidation in towns and villages.

The legislative changes that I will discuss came into force on two separate dates, namely 1 July 2006 and 1 January 2007.

## **2 The individual legislative changes, with comments**

### **2.1 The geographical area of application of the Land Consolidation Act**

The wording of Subsection 3(b)<sup>5</sup>, prior to the changes of 1 July 2006, could call into question the independence of the land consolidation courts. If the properties were in built-up areas, land consolidation could not be effected until the local authority had been given an opportunity to express its opinion. In cases of doubt, the County Governor was supposed to decide what constituted a built-up area. This dragged the executive power into the resolution of questions relating to absolute procedural assumptions in specific cases being heard by the land consolidation court. The Ministry believed that this represented a fusion of powers.<sup>6</sup> This stipulation has now being taken out of the Act, and a new Subsection 1(a) has been inserted stipulating that the Land Consolidation Act applies to all properties unless otherwise follows from the Land Consolidation Act or other legislation. I will not look any further at the exceptions in this paper.

“Urban land consolidation” was introduced as a concept in the mandate for the Movik commission, and in the “Better land use project”.<sup>7</sup> Internationally, the terms “land readjustment” and “land consolidation” are used for urban and rural consolidation respectively. Norway has not in the past used this term, nor has it distinguished between land consolidation in urban and rural areas. What it is important to point out here is that the legislative changes in Ot.prp. no. 78 (2004-2005) do not simply cover urban land-use issues. The new measures introduced in Subsections 2(h) and 2(i) also cover holiday cottage developments, etc. It is also important to realise that the other measures set out in Section 2 can be used in urban areas, cf. Subsection 1(a).<sup>8</sup>

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<sup>4</sup> Ot.prp. no. 78 (2004-2005), p. 5.

<sup>5</sup> “Section 3: Land consolidation cannot be effected:... b) for properties situated in built-up areas, before the building council has had an opportunity to express its opinion. In doubtful cases the County Governor will decide what constitutes a built-up area under the provisions of this act.”

<sup>6</sup> Ot.prp. no. 78 (2004-2005), p. 19.

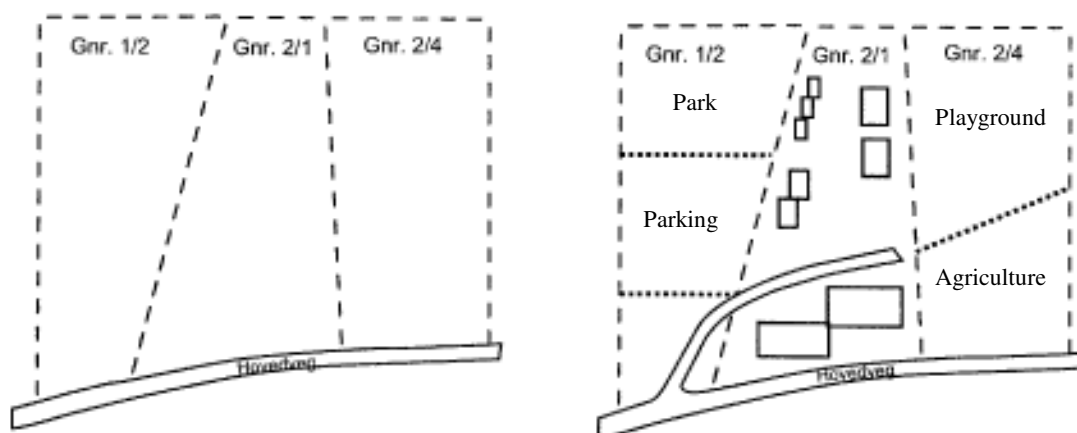
<sup>7</sup> Ot.prp. no. 78 (2004-2005), p. 8 and Ministry of the Environment 2001, p. 58.

<sup>8</sup> See: <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf>

## 2.2 New measures that constitute a change in the law

Two new types of cases were introduced under Section 2. The new Subsection 2(h) applies to the allocation of land values and the splitting of the cost of various shared services in areas that have been defined as an existing or new development area in a zoning plan or building development plan, including holiday cottage developments. The proposal means that property owners whose properties are designated as public outdoor recreation areas, areas for open-air recreation, access roads, etc. in the zoning or building development plan can receive a share of the development rights for other properties in the zoning plan area. The prerequisite for this is that they are private common areas; cf. Gussgard (2007:4).

It is important to point out that it is not enough for there to be a municipal master plan; there must be a zoning or building development plan before land consolidation can be effected. In such cases where there only are a municipal master plan, there will not be a final plan showing the individual sites, and it will be hard for the land consolidation court to allocate land values or distribute costs on the basis of the available information. This also follows from the preparatory works to the Act, which state that Subsection 2(h) applies to the allocation of land values and the splitting of the cost of various shared services in areas that have been defined as an existing or new development area in a final zoning plan or building development plan, including holiday cottage developments.<sup>9</sup>



**Figure 1:** To the left: The property boundaries before the zoning plan. To the right: The situation after zoning plan where owner of cadastral index (gnr.) 2/1 has got all the development rights (Ot. prp. no. 78 (2004-2005), p. 21).

Figure 1 shows three properties before and after an approved zoning plan. In a land consolidation case requested under subsection 2(h) property owners whose properties are designated as public outdoor recreation areas, areas for open-air recreation, access roads, etc. in the zoning or building development plan can receive a share of the development rights for other properties in the zoning plan area.

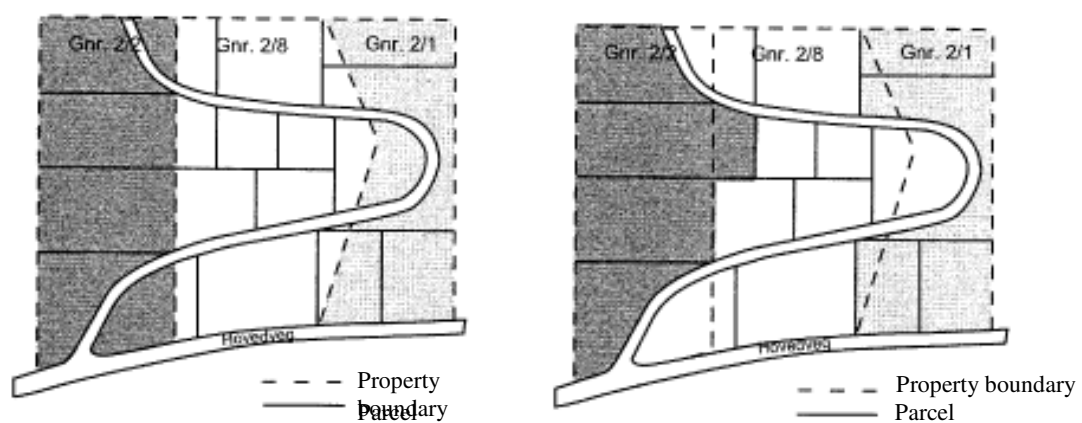
The plan limits who can request that land consolidation be effected. It is possible to imagine a case where a holiday cottage development has been included on a zoning

<sup>9</sup> Ot.prp. no. 78 (2004-2005), p. 5.



plan, and the neighbours of the development are unhappy that they have not received any development rights and that their properties will be used as recreational areas for the holiday cabins. However, they are not entitled to request that land consolidation be effected in order to take part in the development. Unhappy neighbours must raise their objections to the zoning plan while it is being processed by the local authority.

The other type of land consolidation case that was introduced is set out in Section 2(i), which deals with the mitigation of harm when implementing zoning plans in existing building areas or new building areas. In such cases, the other measures in Section 2 are used to rectify awkward property layouts resulting from measures that will be taken according to the zoning or building development plan. An example of a situation is shown in the figure below.



**Figure 2:** To the left: Realising the zoning plan without land consolidation. To the right: Realising the zoning plan in connection with land consolidation (*Ot. prp. no. 78 (2004-2005), p. 24*).

An existing building area means an area that is mainly developed, and a new area means one that is mainly undeveloped.<sup>10</sup> The land consolidation court must in each individual case determine which of these categories the consolidation area falls within, as this affects the requirements for requesting a hearing; cf. paragraphs 2-5 of Section 5, which I will discuss later.

The legislators did not say much about the difference between *existing* and *new building areas*, nor are these terms defined in Norwegian planning legislation. In reference to existing building areas, the preparatory works mention “*infill areas*”.<sup>11</sup> It must be possible for there to be a few existing buildings in a new building area, if apart from them the consolidation area has the characteristics of a new building area, and the latter characteristics are clearly dominant.

It is natural for such issues to be assessed in conjunction with the decision on whether land consolidation should be effected, and the Land Consolidation Court’s decision should make it clear whether it is an existing or new building area. It is clear

<sup>10</sup> *Ot.prp. no. 78 (2004-2005), p. 5.*

<sup>11</sup> *Ot.prp. no. 78 (2004-2005), p. 23 and p. 29.*

that the court's decision must take into account the existing plans for the area, and the description of the area in those plans.

Land consolidation cases can involve one or more of the measures set out in Section 2. As the requirements for requesting a hearing depend on the applicable measure, as do the general requirements, planning issues and allocation of the benefits, it is important to determine what will be the main measure applicable to the case. If the court receives requests that involve the use of traditional measures and new measures, the petitioner and other parties must be made aware of the fact that the absolute procedural assumptions will depend on the main measure applicable. In my opinion this must be clarified during the preparations for the case, and preferably when the court makes a preliminary assessment of the request.

One question that has been raised is whether the legislative changes in Subsections 2(h) and 2(i) are really new, or whether previously existing legislation could be used for the same purposes. The alternative would be to use Subsections 2(b)<sup>12</sup> and / or 2(c)<sup>13</sup>, along with Section 41 of the Land Consolidation Act. Pursuant to the third paragraph of Section 41<sup>14</sup>, the land consolidation court can perform any necessary equalisation of development values.

There is one clear difference. In order to effect land consolidation under Subsections 2(b) or 2(c), the conditions in the first paragraph of Section 1 must be met: *"Properties that are hard to utilise in an efficient manner under the present circumstances can be subjected to land consolidation under this Act."* Under Subsections 2(h) and 2(i), the actual inefficiency has not yet arisen. Such cases are based on a publicly approved zoning or building development plan, but where the new properties have not yet been parcelled out. The land consolidation court has responsibility for performing the division. Subsections 2(h) and 2(i) enshrine in law an exemption from the prerequisites for land consolidation to be effected set out in the first paragraph of Section 1<sup>15</sup>.

Land consolidation courts cannot reallocate development values that have already been allocated through a zoning plan adopted by the local authority if this is requested by one owner or a minority of owners. Where a zoning plan has been adopted, and a request for land consolidation is made, the court must base its valuations of the land on the existing plan. If a property has been zoned for development purposes, as a general rule it should also retain the same designation after consolidation has been effected. This is to ensure that the property does not suffer any loss as referred to in Subsection 3(a)<sup>16</sup>.

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<sup>12</sup> "Section 2(b) reallocating landed property through the exchange of land."

<sup>13</sup> "Section 2(c)

1. prescribing rules relating to the use of any area that is subject to joint use by estates.

2. prescribing rules relating to the use of any area that is not subject to joint use by estates when the land consolidation court finds that the attendant circumstances make such use particularly difficult."

<sup>14</sup> "Section 41. The land consolidation court will effect the necessary equalization of the developmental values. This can be done in the reallocation plan itself by transfer of development rights or in money."

<sup>15</sup> "Section 1. Landed property which it is difficult to utilize efficiently under existing circumstances may be subjected to land consolidation in terms of this Act."

<sup>16</sup> "Section 3. Land consolidation cannot be effected:

a) if the costs and disadvantages involved exceed the benefit accruing to each individual property."



Current law is that Section 41 applies to all projects covered by the PBA, regardless of the designation of the land in the zoning or building development plan,<sup>17</sup> whereas Subsection 2(h) applies to various shared services within the building areas pursuant to the Subsections 20-4 no. 1 and 25 no. 1<sup>18</sup> of the PBA.

If a hearing has not been requested under Subsections 2(h) and 2(i), land consolidations in building areas are also covered by current law. In such cases, the requirement for agreement and consolidation based on the net increase in value does not apply.<sup>19</sup>

One can view this change in the law as giving a more precise legal basis for allocating land values and costs for developments created by a zoning or building development plan once it is implemented. As before, the question of whether land consolidation should be effected, and whether there is a legal basis for it, must be assessed on a case by case basis. It is possible to imagine a situation where a case must be rejected under Subsection 2(h), because the requirements in Section 5 and Subsection 3(b) have not been met, but that it can be effected under Subsections 2(b) and (c) if the requirements in Section 1 and Subsection 3(a) have been met. In such cases, the parties do not need to be in agreement: it is enough for one party to request consolidation, for no-one to suffer any losses and for there to exist an inefficient use of land. The inefficient use of land must have occurred at the time the petition is made; cf. the discussion above. Pursuant to Subsection 3(b), the land consolidation court cannot change the allocation of values between the properties relative to the values before the consolidation took place (see point 2.3 in this paper). In practice I believe that both of these alternative legal routes will end up producing roughly the same final result. It cannot be the intention of the legislators for the final result to vary a great deal between the two methods.

Below I will look at two examples where Subsection 2(c) was used to allocate the development values. These cases were heard before the recent changes in the law discussed in this paper came into force. The first case was heard by Romsdal Land Consolidation Court, and resulted in the development values of the Indergård – Silset properties being equalised pursuant to Subsection 2(c) no. 2 and Section 41. The municipal master plan allowed the construction of 45 holiday cottages within the area, and the hearing was requested because one of the owners wanted approval for a zoning plan for his property. It was rejected, and the local authority demanded that the area had to be looked at as a whole. The zoning plan, including regulations, was drawn up by the land consolidation court and approved by the local authority. Instead of a single owner or a minority of owners getting all of the benefits of the development, 1-9 sites were allocated to each owner. The cost of roads, parking, etc. was also split between the owners.

The other case was heard at Nord-Gudbrandsdal Land Consolidation Court – Skogsetra in Dovre. Again the hearing was requested under Subsection 2(c) no. 2,

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<sup>17</sup> Ot.prp. no. 78 (2004-2005), p. 22.

<sup>18</sup> “Building areas:

*including areas for dwellings with associated facilities, shops, offices, industry, buildings for leisure purposes (leisure cabins with connected outhouses), as well as sites for public (State, county and municipal) buildings with a specified purpose, other buildings of specifically defined use to the general public, hostels and catering establishments and garages and petrol stations.”*

<sup>19</sup> Ot.prp. no. 78 (2004-2005), pp. 24-26.

and the stipulations of Subsection 35(h)<sup>20</sup> and Section 41 were applied. A total of 44 sites for holiday cottages were allocated between 19 owners, and the case also involved the distribution of costs for shared services such as roads, drinking water and waste water. The land consolidation court prepared the zoning plan pursuant to the stipulations of Section 41.

In both of these cases no zoning plan had been adopted prior to the case being requested, so the development values had not previously been allocated between the properties. If a zoning plan had been adopted, the development values would also have been allocated, and the court would have been obliged to base its decision on them.

It is important to note that the first paragraph of Section 41, which allowed land consolidation courts to draw up zoning plans, was removed in conjunction with the changes in the law set out in Ot.prp. no. 78 (2004-2005).

In my opinion there are two ways of processing cases relating to the allocation of development values. One is to use Subsection 2(h), where the procedural assumptions are governed by Section 3 b, the second paragraph of Section 5 and the third paragraph of Section 28 (each property have to receive their part of the increase in value). It is not possible to request this approach until there exists a zoning plan or building development plan. If the local authority has demanded that land values and costs be allocated in accordance with Section 26 of the PBA, the land consolidation court must calculate what proportion of the benefits and costs shall be allocated to each individual property. I will discuss this further in the following section.

The second method is the existing one under Subsections 2(b) or 2(c). Here the procedural (assumptions) are governed by Section 1, Subsection 3(a), the first paragraph of Section 5, the third paragraph of Section 41 and Section 42<sup>21</sup>. The Ministry stated in its preparatory works that the Land Consolidation Act already contains stipulations relating to the allocation of development values; cf. Sections 41 and 42.<sup>22</sup>

Which of these two approaches is chosen affects the requirements for requesting a hearing, the allocation of benefits and development values, the composition of the court and the court fee payable by each party.

### **2.3 New absolute procedural assumption**

For land consolidation cases effected under Subsections 2(h) and 2(i), the Act contains a new absolute procedural assumption. These stipulations have been added as a new Subsection 3(b), and state that properties covered by Subsections 2(h) and 2(i) cannot be consolidated unless each property receives a share of the increase in value in the consolidation area. The increase in value for cases covered by Subsection 2(h) can be very high, and the Ministry believed that it was reasonable for the parties to receive their proportionate share of the added value created. It was the opinion of the Ministry that it would be unfortunate if owners of properties that made

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<sup>20</sup> "Section 35 (h) laying down rules for the joint use of sand and gravel pits, water rights, and joint use in connection with recreation and tourist purposes as a part of an agricultural programme."

<sup>21</sup> Section 42, see: <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf>

<sup>22</sup> Ot.prp. no. 78 (2004-2005), p. 21.

a significant contribution to the increase in value of the consolidation area were to receive a disproportionately small share of the increase in value, or were simply to break even.<sup>23</sup> Subsection 3(b) of the Land Consolidation Act is supposed to help ensure a fairer outcome of the consolidation process, and for cases under Subsections 2(h) and 2(i) it replaces the guarantee against losses contained in Subsection 3(a).<sup>24</sup>

The term “increase in value” refers the net increase in value, which has to be calculated for the whole consolidation area.<sup>25</sup> This is dependent on the consolidation area being precisely defined and having clear boundaries in accordance with Section 25<sup>26</sup>. The increase in value is calculated by adding up the net contributions of all of the individual properties. Individual properties shall receive a share of the overall benefit proportionate to their contributions.<sup>27</sup>

In my opinion, the court must be very precise about defining the boundaries of the consolidation area. The decision in land consolidation cases often reads: “*The land consolidation is being effected in accordance with the request*”. Such a decision is dependent on the request being precisely defined, and preferably shown on a map, which is not always the case, or on the scope and geographical boundaries of the case having been clarified in the justification and assessment of the court.

In terms of defining the boundaries of consolidation areas, the Ministry of Agriculture (1991) has stated that the land consolidation court must, in consultation with the parties, attempt to find a natural boundary for the consolidation area based on the terrain and legal position. The court records shall state what the boundaries of the consolidation area are. Note 2 on page 171 of the annotated edition of the Land Consolidation Act (Austenå og Øvstedal 2000) also makes it clear that it can be difficult to define the boundaries of consolidation areas, and that it is necessary to look at the functional relationship between the properties. The comment does not clarify what a functional relationship is. It follows from the preparatory works that the request should define the boundaries of the problems that the land consolidation court is to resolve, but that the land consolidation court should be free to resolve the matter with the framework of the Land Consolidation Act.<sup>28</sup>

In cases being heard under Subsections 2(h) and 2(i), the land consolidation court cannot change the area covered by consolidation request without the agreement of the parties. With the agreement of the parties, the consolidation area can be either extended or reduced in size.<sup>29</sup> This follows from the third paragraph of Section 25 and the first paragraph of Section 26.<sup>30</sup>

It will be the valuation methodology used and the quality of the valuation itself that will determine whether the requirements set out in Subsection 3(b) are met. The valuation methodology used must be presented to the parties in such a way that it is

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<sup>23</sup> Ot.prp. no. 78 (2004-2005), p. 27.

<sup>24</sup> Ot.prp. no. 78 (2004-2005), p. 6.

<sup>25</sup> Ot.prp. no. 78 (2004-2005), p. 44.

<sup>26</sup> “Section 25. The consolidation area shall ordinarily be limited to correspond to the application for land consolidation.”

<sup>27</sup> Ot.prp. no. 78 (2004-2005), p. 44.

<sup>28</sup> Ot.prp. no. 56 (1978-1979), p. 60.

<sup>29</sup> Ot.prp. no. 78 (2004-2005), p. 45.

<sup>30</sup> Section 25 and 26, see: <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf>

comprehensible to them, and allows them to enter into a dialogue with the court. In such cases, in all probability the best option will be to produce a valuation that reflects the true value of the properties. I will return to this in Section 2.5.

In my opinion, each individual property must be subjected to a specific assessment, some kind of valuation must be performed and the calculation must be based on the normalised utility value (Austenå and Øvstedal 2000:45). When the land consolidation court is assessing whether the requirements of Subsection 3(b) can be fulfilled, it must start out by considering potential consolidation plans, to a much greater extent than has been normal when assessing Subsection 3(a).

## **2.4 Requirements for requesting a hearing**

Ot.prp. nr. 78 (2004-2005) introduces a new principle into Norwegian land consolidation legislation, which is the requirement for a double majority in order to request a land consolidation under Subsection 2(h) or 2(i). The majority requirement refers to owners and land areas. These requirements can be found in a number of other countries (e.g. in Cyprus), but they have not previously existed in Norwegian legislation (see Sky 2007 and Van der Noort 1987). In certain countries the requirement for a majority also applies to the adoption of a plan (e.g. in Denmark). This is not yet the case in Norway.

Paragraphs 2-5 of Section 5 of the Land Consolidation are new, and read as follows: *“A hearing can only be requested under Subsection 2(h) if all of the owners affected by the land consolidation are in favour. If conditions for allocation have been adopted pursuant to the fifth sentence of the first paragraph of Section 26 of the Planning and Building Act, a hearing can nevertheless be requested under Subsection 2(h) if the owners of at least 2/3 of the properties are in favour, and the land owned by them constitutes at least 2/3 of the building area. The request must in such cases relate to the whole building area.*

*A hearing can only be requested under Subsection 2(i) no. 1 if all of the owners who will be affected by the land consolidation are in favour.*

*A hearing can only be requested under Subsection 2(i) no. 2 if the owners of at least 2/3 of the properties are in favour, and the land owned by them constitutes at least 2/3 of the building area. The request must in such cases relate to the whole building area.*

*When calculating the number of owners for the second sentence of the second paragraph and the fourth paragraph above, companies are not included if land owners within the building area have a controlling influence over them.”*

The above circumstances must have been clarified no later than when the court is to assess whether there are grounds for a hearing. One question that this begs is who is responsible for ensuring that these matters have been clarified. In my opinion, the fundamental principles of civil procedure mean that the parties (petitioner) must be responsible for obtaining this information. There must be a map of the area and property boundaries (with title holders), and the parties must have made their final opinion known as to whether or not they are in favour of the request. This can be done at a court hearing or in a formal letter to the court. In cases of the doubt, the land consolidation court must be able to calculate the areas and naturally check the information provided. In the event of a dispute, and if the result will determine

whether or not the land requirement is satisfied, the court must issue a judgement; cf. the first paragraph of Section 17<sup>31</sup>.

It is important to note that people with rights of use and lessees cannot request a hearing, and shall not be included in the assessment of whether the requirements for requesting a hearing have been met, but they shall be included as parties to the case if land consolidation is to be effected.

The preparatory works to the Act do not say what is meant by the phrase “*the request can then cover the whole building area*” in the second and fourth paragraphs of Section 5. This begs the question of whether it can be requested for parts of the building area. In my judgement, this must be possible, and land consolidation can be requested for the parts of the building area where there are property issues that need resolving. This must certainly be the case for land consolidation under Subsection 2(i), but it is different for land consolidation under Subsection 2(h) where the local authority has determined a formula for the allocation of land values and the splitting of the cost of various shared services pursuant to the fifth sentence of the first paragraph of Section 26 of the PBA<sup>32</sup>. The new rule in Section 26 of the PBA applies if there exists a zoning or building development plan. Values cannot be allocated pursuant to Section 26 of the PBA on the basis of a municipal master plan.

## **2.5 Valuation and planning issues**

Should the court produce valuations in relative or real terms? There are several circumstances that support the use of real values. By real values I here mean the market values. The parties will probably find it easier to understand a valuation based on real values. The difference between a valuation in urban areas and one in agricultural, countryside and open-air recreational areas is the value of the land. For example, the location of a building site will have a big impact on its value, often to a much greater extent than for agricultural land. Small errors in calculating areas can have a big impact on absolute values. Normally the market value of a site will depend on its location within the area and the cost of preparing it for construction.

Land consolidation courts will face major challenges when attempting to calculate the “true” value. We are dealing with fluctuating site values and a market that is not always predictable. The boundaries of the zoning area will also have a big impact on the valuation, and must be seen in the context of the boundaries of the consolidation area. The court must also take into account the cost of connecting water and electricity, and other issues affecting the cost of construction. A significant amount of personal judgement will be required, even for urban valuations.

When valuing sites as development land, the location, accessibility, view, preparation costs, access and garden, etc. must be taken into account by the

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<sup>31</sup> “Section 17. Any disputes concerning boundaries, right of ownership, right of user, or other matters within the consolidation area or with outsiders shall be decided by the judgement of the land consolidation court if this is necessary for the purpose of land consolidation.”

<sup>32</sup> In a stipulation to a zoning or a building development plan it can be demanded that allocation of land values and the splitting of the cost of various shared services within the zoning plan area should be in accordance with subsection 2(h), cf. paragraphs 2-5 of section 5 in the Land Consolidation Act.

valuation. These are strict requirements. This is another argument for real valuations being preferable.<sup>33</sup>

The first sentence of the third paragraph of Section 28 of the Land Consolidation Act regulates the valuation principles for cases being heard under Subsection 2(h). It states that the whole consolidation area shall be valued as development rights. The legislators do not say what they mean by the term “development rights”, but it is probably reasonable to assume that it means sites and land that can be developed in some way or another, and which has planning permission. Development rights are therefore established through planning decisions. This clarifies the gross utility value of the whole consolidation area, and of the individual parts. Individual matters, such as harm suffered, consolidation costs, investment costs for shared services and maintenance costs are calculated and allocated in accordance with current law.<sup>34</sup> In the opinion of the Ministry, areas within the consolidation area must therefore be valued as development rights, regardless of their designations in the zoning plan or building development plan.<sup>35</sup>

One tool that the courts have at their disposal when performing valuations is the ability to check the sales prices of comparable sites. This information can help to show how differences in location affect the values of sites. It is worth emphasising that this must all be done in total transparency, particularly if the court receives the agreement of the parties to collection such information.

The legislative changes also introduce some new planning principles. Pursuant to the third paragraph of Section 28, cases under Subsections 2(h) and 2(i) shall be consolidated in such a way that each property gets a share of the increase in value. One of the consequences of this, is that the court must already assess whether it is possible to create a consolidation plan that shares out the net consolidation benefits when the request for a hearing is made.

It follows from the fourth paragraph of Section 28 that cases under Subsection 2(h) shall be assessed on the basis of the characteristics of the properties from a development point of view. Cases under Subsection 2(i) shall be consolidated on the basis of the increase in value produced by the implementation of the measures set out in subsections 2 (a-g).

The second sentence of the fourth paragraph of Section 28 of the Land Consolidation Act, which applies to cases under Subsection 2(i), states that the utility value of the consolidation area shall be calculated in accordance with current law; cf. the first paragraph of Section 1. This means that the increase in value of the consolidation area resulting from the consolidation measures set out in Section 2 shall be used.<sup>36</sup>

Furthermore, it follows from the new stipulations in Subsection 29(a) that for cases under Subsection 2(h), the net increase in value shall, in so far as it is possible, be defined as the development rights on or adjoining the property in question. If the increase in value of a property only constitutes a part of a whole development right,

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<sup>33</sup> Ot.prp. no. 78 (2004-2005), p. 23.

<sup>34</sup> Ot.prp. no. 78 (2004-2005), p. 45.

<sup>35</sup> Ot.prp. no. 78 (2004-2005), p. 33.

<sup>36</sup> Ot.prp. no. 78 (2004-2005), p. 45.

the owner of the largest share shall take precedence in terms of obtaining development rights pursuant to the first paragraph. Where “*in so far as it is possible*” cannot be achieved, it will be up to the land consolidation court to decide what development rights are to be given to the parties in the consolidation area. If several parties are unable to receive a whole development right, they will receive shares of the development right in proportion to their original land holdings (see front page). If this right is a site, personal joint ownership will be established.<sup>37</sup>

If the parties agree to it, the land consolidation court can transfer land against payment in such cases as those described above; cf. the second and third paragraphs of Subsection 29(a).

### **3 Concluding thoughts**

It is still far too early to say what the scope of the new types of cases defined in Subsections 2(h) and 2(i) will be. Earlier reports, such as the project “*Better land use in towns and villages*”, gave clear indications that there was a need for land consolidation measures for towns and villages. I think that we will see an increasing number of cases in urban areas based on the requirements set out in Subsections 2(a-g), which now also apply to urban areas. I am here thinking of people establishing private roads in a residential areas, defining rules relating to parking rights, minor land exchanges within development areas, etc.

In conjunction with the presentation of the Movik Commission’s report, there were some doubts raised about the expertise of the land consolidation courts for dealing with cases in urban areas. This objection was treated seriously, and the judges at the land consolidation courts have attended courses on urban property issues.

It is important for the judges to share their experiences with one another, and for final judgements to be made available on the Lovdata website. This is particularly important as a way of ensuring that people who are not involved with the courts gain an insight into how various problems can be resolved.

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<sup>37</sup> Ot.prp. no. 78 (2004-2005), p. 34.



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**Appendices: Some important changes to the law as a result of the adoption of Ot.prp. no. 78 (2004-2005)**

**The following amendments were made to the Act of 21 December 1979 relating to Land Consolidation, etc. (The Land Consolidation Act):**

**Section 1a.** This Act applies to all properties unless otherwise stipulated in this Act or in other legislation.

**Section 2.** Land consolidation may involve:

h) allocating land values and distributing the cost of various joint projects within a building area as defined in Subsections 20-4 no. 1 and 25 no. 1 of the Planning and Building Act.

i) reallocating land and rights in order to rectify awkward property layouts that have arisen as a result of approved zoning plans or building development plans under the Planning and Building Act in areas that are:

1. existing building areas,
2. new building areas.

**Section 3.** Land consolidation cannot be effected:

b) for properties covered by Subsections 2(h) and 2(i), unless each property receives a share of the increase in value of the consolidation area

**Section 5.** Any owner of an officially registered property and anyone who has a perpetual right of use can request that land consolidation be effected.

A hearing can only be requested under Subsection 2(h) if all of the owners affected by the land consolidation are in favour. If conditions for allocation have been adopted pursuant to the fifth sentence of the first paragraph of Section 26 of the Planning and Building Act, a hearing can nevertheless be requested under Subsection 2(h) if the owners of at least 2/3 of the properties are in favour, and the land owned by them constitutes at least 2/3 of the building area. The request must in such cases relate to the whole building area.

A hearing can only be requested under Paragraph 2(i) no. 1 if all of the owners who will be affected by the land consolidation are in favour.

A hearing can only be requested under Paragraph 2(i) no. 2 if the owners of at least 2/3 of the properties are in favour, and the land owned by them constitutes at least 2/3 of the building area. The request must in such cases relate to the whole building area.

When calculating the number of owners for the purposes of the second sentence of the second paragraph and the fourth paragraph above, companies are not to be included if landowners within the building area have a controlling influence over them.

**Section 9. (seventh paragraph)**

For cases being heard under Subsections 2(h) and 2(i), half of the land consolidation court's lay judges shall be appointed from the panel of experts pursuant to Section 14 of Act no. 1 of 1 June 1917 relating to Assessment and Expropriation Cases.

**Section 20a.** If a consolidation plan needs to be based on a decision by the public authorities, that decision must be available when the court reaches its verdict on the consolidation plan.

**Section 25.** The boundaries of the consolidation area shall normally correspond to those set out in the consolidation request.

The land consolidation court can set a deadline for requests that the consolidation area be extended. Requests that are submitted after this deadline shall be rejected. Nevertheless, the land consolidation court can comply with the request if it considers there to be strong grounds for doing so. Consideration shall be given to issues such as the opinions of the other parties with regard to the requested extension and whether it will cause undue delay.

For cases being heard under Subsections 2(h) and 2(i), the boundaries of the consolidation area specified in the consolidation request can only be changed if all of the parties are in favour.

If the land consolidation court decides that this is necessary in order for the land consolidation to be effective, it can decide to include remaining parts of the properties and other properties in the land consolidation.

**Section 26.** The land consolidation court shall change the conditions of ownership and rights of use by land reallocation, joint projects, specifying rules relating to use and common use and replacing and altering rights of use, in so far as it considers these measures necessary in order to meet the request. A request can be made for a more extensive land consolidation. If the request in cases being heard under Subsections 2(h) and 2(i) is to be amended, all of the parties must be in favour.

**Section 28. (third and fourth paragraph)**

In cases being heard under Subsections 2(h) and 2(i), the land consolidation shall ensure that each property receives a share of the increase in value.

In cases being heard under Subsection 2(h), the land consolidation values shall be determined on the basis of the characteristics of the properties for development purposes. In cases being heard under Subsection 2(i), the consolidation value shall be determined on the basis of the increase in value produced by implementing the measures described in 2 (a-g).

**Section 29a.** In cases being heard under Subsection 2(h), the net increase in value shall, in so far as it is possible, be defined in terms of whole development rights on or adjoining the owner's own property.

If the increase in value of a property only constitutes part of a whole development right, the owner of the largest share shall take precedence in terms of obtaining development rights pursuant to the first paragraph.

If all of the parties are in favour, the land consolidation court can transfer land against payment in such cases as those described in the second paragraph above.

**Section 34a.** The land consolidation court can establish joint projects in conjunction with the development and use of properties.

**Section 35.** Rules on use and common use may, inter alia, include:

f) rules relating to the common use of sand pits, gravel pits and water rights, as well as the common use of areas for recreation and tourism purposes.

j) rules relating to the common operation and maintenance of roads, and to the common use of parking areas, playgrounds, parks, etc.

**Section 41.** The land consolidation court shall take into account plans under the Planning and Building Act.

The land consolidation court can organise the joint projects required in conjunction with such plans.

The land consolidation court performs any necessary equalisation of development values. This can be done in the consolidation plan itself, through the transfer of development rights or by monetary payment.

**The following change has been made to Act no. 77 of 14 June 1985 relating to Planning and Building.**

**§ 26. *Zoning provisions***

To the extent necessary, provisions may be made by means of a zoning plan concerning the design and use of areas of land and buildings in the area covered by the plan. The provisions may impose conditions for use or may prohibit certain types of use in order to promote or ensure compliance with the purpose of the zoning. It may also be required that measures in pursuance of the plan are implemented in a special order. No provisions may be laid down concerning the discharge of water or the water level. The provisions of the zoning plan or building development plan can specify requirements relating to the allocation of land values and the cost of various joint projects within the area covered by the plan in accordance with Subsection 2(h) of the Land Consolidation Act; cf. the second paragraph of Section 5.

Provisions pursuant to the first paragraph should stipulate the smallest play area required for each dwelling unit and lay down further rules for the content and design of such areas.

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